

May 28, 2004

Joseph DuBray, Jr., Director
OFCCP Division of Policy, Planning, and Program Development
Room #C-3325, 200 Constitution Ave., NW
Washington DC 20210

Re: Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes

Dear Mr. DuBray:

The National Women's Law Center (*Center*) submits the following comments on the OFCCP's Proposed Rule concerning UGESP (Uniform Guidelines on Employee Selection Procedures) requirements applicable to federal contractors. 69 Fed. Reg. 16446 (March 29, 2004) (*OFCCP UGESP Proposal*). For more than thirty years, the Center has worked to expand employment opportunities for women and to ensure full enforcement of the laws against sex discrimination in the workplace. The Uniform Guidelines play a vital role in this endeavor by helping to ensure that the selection procedures used by employers – including federal contractors – do not have a disparate impact on women and other protected groups in violation of Title VII. The OFCCP UGESP Proposal not only undermines effective enforcement of the law, it stands in clear conflict with interpretive guidance on the same issues just issued by the four federal agencies (*UGESP Agencies*), including OFCCP, responsible for promulgation and enforcement of the Uniform Guidelines. Because the OFCCP UGESP Proposal would weaken civil rights protections and add nothing to the process but confusion, the Center strongly opposes the Proposal, and urges the Agency to withdraw its Proposed Rule.

Background

In late 2000, in light of increasing use of the internet for job recruitment and applications, the UGESP Agencies were charged with the task of interpreting how UGESP's requirements concerning treatment of, and recordkeeping regarding, "applicants" should be applied in the context of the internet, and thus determining the need for any changes in the Questions and Answers (Q&A) accompanying UGESP. After several years of work and numerous time extensions, the UGESP Agencies finally issued draft interpretive guidelines in early March. *Re: Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies*, 69 Fed. Reg. 10152 (March 4, 2004) (*UGESP Agencies' Proposal*). Comments submitted by the Leadership Conference for Civil Rights Employment Task Force and in which the Center joined, *Comment Letter of the Leadership Conference for Civil Rights Employment Task Force* (filed May 3, 2004), expressed serious concerns about certain aspects of the proposed Q&As, but commended the UGESP Agencies for properly confining the inquiry to the task at hand – making it clear that neither the Uniform Guidelines themselves nor the general definition of "applicant" were being modified in any respect.

Analysis

Under the guise of issuing "further guidance," the OFCCP UGESP Proposal inexplicably and improperly ignores these confines, instead proposing interpretations that make discrimination easier to commit and harder to track, create inconsistencies within an employer's own selection and recordkeeping procedures, and directly conflict with the guidance just issued by the UGESP Agencies. One key element of UGESP is

its requirement that employers keep records on those who apply for jobs so that this group can be compared to those selected in order to determine whether the employer's selection procedures have a disparate impact on protected groups. The OFCCP UGESP Proposal would create a new class of "internet applicants" restricted to those who, *inter alia*, "possess[] the advertised, basic qualifications for the position." 69 Fed. Reg. 16446, 16447. Individuals will not be considered internet applicants, moreover, until the employer "considers the individual for employment in a particular open position." *Id.*

These restrictions improperly allow an employer to limit its applicant pool, and to exclude particular applicants virtually at will by asserting either that those applicants do not meet the basic qualifications for the job or by simply refusing to consider their applications at all. This approach is directly contrary to the requirements of UGESP and to the purposes of Title VII disparate impact analysis, which require assessment of whether the "basic qualifications" for a position themselves disproportionately exclude a protected group from consideration. By conflating "applicants" with "qualified candidates," the OFCCP UGESP Proposal completely insulates basic selection criteria from scrutiny. By additionally restricting applicants to those whom the employer actually considers for a job, the Proposal further allows an employer to manipulate the composition of the applicant pool in ways that can mask discrimination in selection or hiring.

The OFCCP UGESP Proposal also would create two different definitions and categories of applicants based on the method by which their applications were submitted. Not only could this create confusion for applicants and impose dual recordkeeping requirements on employers, it would greatly increase the chances that similarly situated applicants would not be treated equally in the consideration process. The Notice of Proposed Rulemaking discusses the OFCCP's enforcement procedures, but it provides no enforcement-grounded rationale for creating a new definition of applicant for federal contractors.

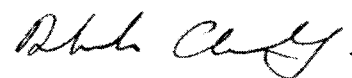
Finally, in light of the just-issued UGESP Agencies' Proposal, the OFCCP UGESP Proposal represents *conflicting*, not "further," guidance, thereby undermining the purpose of the initial rulemaking, which was to "provide a *common* interpretation" of the *Uniform* Guidelines (emphases added). In contrast to the OFCCP UGESP Proposal, the UGESP Agencies' Proposal did not incorporate basic qualifications or other restrictions as part of the applicant definition; did not create two completely different definitions of applicants; and did not contemplate different sets of recordkeeping requirements for these sets of applicants. The UGESP Agencies' Proposal already contained some problems with assuring that similarly situated applicants are treated equally. If adopted, the OFCCP UGESP Proposal would exacerbate these problems by creating confusion and noncomparability of records for employers, noncomparable and therefore meaningless data for OFCCP enforcement purposes, and most likely noncomparability in treatment for job applicants.

The Notice of Proposed Rulemaking characterizes the OFCCP UGESP Proposal as "further information ... that will allow each agency to carry out its specific enforcement responsibilities." However, this proposed rule addresses many of the very same questions addressed in the UGESP Agencies' Proposal, and provides different, and deficient, answers to those questions. Consequently, the Center urges OFCCP to withdraw the proposed regulations and to work to improve the UGESP Agencies' Proposal in the ways set forth in the comment letter submitted by the Leadership Conference on Civil Rights in that rulemaking.

Sincerely,



Jocelyn Samuels
Vice President for Education and Employment



Deborah Chalfie
Senior Counsel